No. 196

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

ALEX PISCIOTTA,
Petitioner,

—*vs.*—

CITY OF NEW YORK, and COMPTROLLER OF THE CITY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

HOWARD A. AMELI,
Attorney for Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York.

JURISDICTION.

The decision of the Court of Appeals of the State of New York, affirming the order of the Appellate Division of the Second Department of the Supreme Court of the State of New York, Kings County, was rendered on the 27th day of February, 1950, without any opinion.

The Court of Appeals of the State of New York, after a motion for reargument, or in the alternative, to amend the remittitur, decided on the 13th day of April, 1950 as follows:

> "Upon this appeal there was presented and necessarily passed upon a question of the interpretation of a Federal Statute, namely, the Federal Soldiers and Sailors Civil Relief Act (U. S. Code title 50, Appendix, Sec. 510 et seq.). This Court held that the federal statute did not supersede or suspend the provisions of the Administrative Code of the City of New York, Section 93C-2.0."

The Appellate Division, Second Department of the Supreme Court of the State of New York, Kings County, on July 12th, 1949, reversed the judgment of the Supreme Court of Kings County of the State of New York, which was entered on February 16, 1949 after a trial before Hon. Frank E. Johnson, a Justice of the Supreme Court of the State of New York, without a jury.

Jurisdiction of this Court is invoked under Title 28, Section 1257(3) of the U. S. Code.

OPINIONS BELOW.

The opinion of the Supreme Court of Kings County, State of New York (R. pp. 73-74), not officially reported, is annexed hereto in the appendix.

The memorandum decision of the Appellate Division, Second Department, of the Supreme Court, Kings County, State of New York (R. p. 86), not officially reported, is annexed hereto in the appendix.

STATUTES INVOLVED.

50 U. S. Code title 50, Appendix, Section 501, *et seq.*, known as the Soldiers and Sailors Civil Relief Act, of which Section 510 is as follows:

> "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United

States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this act remains in force." (Oct. 17, 1940, c. 888, Sec. 100, 54 Stat. 1179.)

The Administrative Code of the City of New York, Section 93c-2.0, is as follows:

> "Every official, employee or person who shall sign the receipt upon such payroll as having received the amount therein mentioned in full payment for services rendered by him for the entire time specified in such payroll, shall be deemed to have made an accord and satisfaction of all claims against the city for wages or salary due to such person from the city for the period covered by such payroll, unless at the time of signing such payroll the person receiving such wages or salary shall write legibly thereon in connection with his receipt that the amount received is received under protest, and unless such protest is so written upon such payroll, no recovery shall be had against the city upon any further claim for wages or salaries for the period of time covered by such payroll."

STATEMENT.

The petitioner was appointed a Magistrate in the Magistrates' Court of the City of New York, with a salary of $10,000.00 per annum, on the 1st day of January, 1942 (R. pp. 5, 26).

He was a member of the Officers Reserve Corps of the United States Army, and on the 19th day of January, 1942, was ordered into active duty in the Army of the United States, wherein he served until the 2nd day of May, 1946 (R. pp. 5, 6, 16, 17).

By virtue of the provisions of the Military Law of the State of New York, Section 245, he was entitled to receive the difference in pay between his salary as an army officer and that of a City Magistrate.

On the 28th day of March, 1946, petitioner served notice of claim for the differential in his pay upon the City of New York (R. pp. 59-63); and thereafter and on the 4th day of March, 1947, he commenced his action against the City of New York to recover the said differential in pay (R. p. 9).

On the 16th day of February, 1949, he recovered a judgment against the City of New York in the sum of $22,183.55 (R. p. 14).

Thereafter the City of New York appealed from said judgment, and on the 27th day of June, 1949, the Appellate Division, Second Department, of the Supreme Court of the State of New York, unanimously reversed the judgment of the Supreme Court of Kings County (R. pp. 81, 82).

Following this, your petitioner appealed to the Court of Appeals of the State of New York from said judgment of the Appellate Division, and on the 25th day of February, 1950, the said Court of Appeals affirmed the judgment of the Appellate Division, Second Department of the State of New York.

On the 13th day of April, 1950, the Court of Appeals amended the remittitur to the effect that the Federal Statute, U. S. C. Title 50, Appendix, Section 510, *et seq.*, did not supersede or suspend the provisions of the Administrative Code of the City of New York, Section 93c-2.0.

QUESTION PRESENTED.

Whether the Federal Statute known as the Federal Soldiers and Sailors Civil Relief Act, U. S. C. Title 50, Appendix, Section 501, *et seq.*, superseded and suspended the provisions of the Administrative Code of the City of New York, Section 93c-2.0?

REASONS FOR GRANTING THE WRIT.

The memorandum decision of the Appellate Division, Second Department, of the Supreme Court of the State of New York, County of Kings, is based upon the failure of the petitioner to sign the pay roll under protest in accordance with the provisions of Section 93c-2.0 of the Administrative Code of the City of New York. This decision gives preference to a State statute over an Act of Congress.

The Court of Appeals of the State of New York has affirmed the Appellate Division decision, and holds that the Federal Statute known as the Soldiers and Sailors Civil Relief Act, did not supersede or suspend the provisions of the Administrative Code of the City of New York.

The Federal Soldiers and Sailors Civil Relief Act, 50 U. S. C., Appendix 501, *et seq.*, is a Federal Statute passed by Congress, and as such is the supreme law of the land (under) Article VI, Clause 2 of the Constitution of the U. S. *Winslow* v. *Harold G. Ferguson Corp.*, (1944) 153 P. 2d 714, 25 Cal. 2d 274.

Section 510 of the said Act states the purpose, namely, to temporarily suspend legal proceedings and transactions which may prejudice the civil rights of persons in the service of the armed forces of the United States.

While the petitioner was in the United States Army he did not sign and never had an opportunity to sign the pay roll under protest as prescribed in the Administrative Code of the City of New York. His failure to sign the pay roll under protest bars him from any recovery of any claim for

differential in wages or salary during the period in which he failed to sign, unless the federal Soldiers and Sailors Civil Relief Act, *supra,* suspends the operation of the Administrative Code.

In Section 510 of the Soldiers and Sailors Civil Relief Act, *supra,* transactions are temporarily suspended. The word "transactions" is generic in that sense and therefore all-embracing. Congress did not attempt to enumerate the transactions by which a service man's civil rights might be prejudiced, as they did his legal proceedings. So that the signing of the payroll is a transaction well within the definition of the term.

Definitely there is a conflict between the right of the suspension of any transaction prejudicing the civil rights of the petitioner under the Federal Soldiers and Sailors Civil Relief Act, *supra,* and the obligation he had to assume in order to protect his rights under the Administrative Code of the City of New York, *supra.*

Under such circumstances the Federal Statute will supersede and suspend the State statutes; viz.:

> An Act of Congress will prevail over a state statute which is in conflict with the Act. *U. S.* v. *Emory,* (1941) 62 S. Ct. 317, 314 U. S. 423;
>
> In view of the clause (Clause 2, Article VI of the U. S. Const.) a law passed by a state in exercise of its acknowledged powers must yield to a Congressional Act with which it comes in conflict. *Adams* v. *Atlantic County,* (1947) 53 A. 2d 168;
>
> The United States Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, anything in the constitution or laws of any state to the contrary notwithstanding. *Testa* v. *Katt,* 330 U. S. 386;
>
> The purpose of clause 2 of this article was to avoid the disparities, confusions and conflicts that would follow if the federal government's general authority

were subject to local controls. *U. S.* v. *Allegheny Co.*, 322 U. S. 174;

> Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield. *Yalobusha County* v. *Crawford*, 165 F. 2d 867.

It was the plan of Congress under the federal Soldiers and Sailors Civil Relief Act, *supra*, to relieve every service man from worry concerning any legal proceeding or transaction prejudicing his civil rights, so that he could devote his entire effort and energy to the defense need of the nation.

The obligation, which is a transaction, imposed upon the petitioner under Section 93c-2.0 of the Administrative Code of the City of New York, *supra*, would defeat the plan of Congress. Such a statute coming in conflict with an Act of Congress must give way.

> The authority of state laws, or their administration, may not interfere with the carrying out of a national purpose, and where enforcement of a state law would handicap efforts to carry out the plans of the United States, the state enactment must give way. *U. S.* v. *Mayo*, (D. C. Fla., 1942) 47 F. Supp. 552, aff. 319 U. S. 441.

CONCLUSION.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HOWARD A. AMELI,
Attorney for Petitioner.

July, 1950.

APPENDIX.

Opinion of Johnson, J.

(Reported in New York Law Journal, February 10, 1949.)

The plaintiff, shortly after being appointed magistrate on January 1, 1942, for a full term, was duly called into the army by virtue of his obligations as a reserve officer; he had been a city employee before he became a magistrate; soon after he had been inducted into the army accusations were made about his conduct *prior* to his appointment as magistrate. These charges had no substance, as the Appellate Division and the grand jury have since clearly indicated; even at that time, their lack of substance should have been apparent to an impartial investigator. The mayor who had appointed plaintiff, particularly through his Commissioner of Investigations, persuaded plaintiff to write a letter agreeing to a diminution of future salary as magistrate while he was in the army.

The testimony requires finding that this was under unjustified threats and duress, and against the true attitude of the plaintiff, and agreed to by him as the choice of threatened evils.

Thereafter his agent, acting under a power of attorney while he was in the army, signed monthly pay receipts without protesting; the failure to protest and the writing of the letter were two parts of the one agreement, and are no more effective than the agreement itself, which was void for fraud and duress. The fraud consisted in claims of the reality of the charges when, as since successfully proven and as should have been seen, they had no reality. These "police state" methods (apparently concurred in by the then comptroller, who seems responsible for preparing a payroll for the 1942 salary at *less than what it should have been under the 1942 budget*), seem not only to have been without legal authority but to evidence the then administration's cooperation in an illegal and tyrannical abuse of power.

Failure of the plaintiff to appear before the comptroller before suing is plainly without his fault, as appears by the uncontradicted evidence; the comptroller, without insisting upon his appearance, proceeded to pass on the claim now sued upon, and rejected it as if he had already availed himself of all his statutory rights to examine the plaintiff; he clearly waived an examination that he is not *compelled* to avail himself of, and may choose not to hold.

For the reasons stated on the record at the end of the trial there are various inferences concerning the true facts which are partly dependent upon the defendant's failure to produce that Commissioner of Investigations, despite the fact that he is a member of the Bar and maintains a law office in this city; the then comptroller also failed to testify and the city made no attempt whatever to sustain even *one* of the so-called charges at the trial.

Judgment for the plaintiff for the amount sued for, with the interest to be computed on each item from the date of each illegal withholding. (Italics in original.)

Memorandum Decision by Appellate Division.

(Reported in New York Law Journal, June 28, 1949.)

Action by plaintiff, a Magistrate of the City of New York, to recover the difference between the salary differential allegedly due under Section 245 of the Military Law and the amount actually paid him as such differential while in military service. Plaintiff had agreed to accept a smaller sum as the differential provided by said section; and in this action claimed that his waiver of the full amount had been induced by fraud and duress. No written protest as to the amount paid was noted upon the payroll receipts either by plaintiff or by his agent to receive the salary, acting under a power of attorney. Judgment in favor of plaintiff reversed on the law and the facts, with costs and the complaint dismissed on the law, with costs. The receipt, without protest, of the salary paid is a complete bar to this action (Administrative Code of the City of New York, Sec. 93c-2.0; Quayle v. City of N. Y., 278 N. Y. 19; Gendel v. City of N. Y., 297 N. Y. 933). In any event a new trial would be granted because, in our opinion, the finding of coercion, particularly with respect to the failure to sign the payroll receipts under protest, is against the weight of the evidence. All concur.

AUG 12 1950
CHARLES ELMORE CROPLEY

(33001)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 8, 1950.

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POINT I

Nothing in the federal Soldiers' and Sailors' Civil Relief Act is inconsistent with or renders inapplicable the bar of New York City Administrative Code, §93c-2.0.

(1)

We have no dispute with the proposition that a state statute must yield to a federal law with which it comes in conflict. It is our view, however, that the New York City Administrative Code provision which bars a claim for

additional salary in the absence of a written protest on the payroll is not in conflict with the federal Soldiers' and Sailors' Civil Relief Act.

(2)

The petitioner contends that the federal Soldiers' and Sailors' Civil Relief Act is inconsistent with the Administrative Code bar to recovery of additional salary where there has not been a written protest on the payroll.

Undoubtedly the federal law was designed to afford broad protection to those entering the military service, and it should be liberally construed for the accomplishment of this purpose. It must be read with an eye friendly to those who enter the military service. It does not, however, establish a complete immunity for servicemen in all their legal relationships; nor does it protect them from the legal effect of all their acts or omissions. The law deals with specific situations and provides in detail for such situations. In construing such a statute there is no basis for applying it to situations not dealt with in the various specific provisions of the law on the theory that, although the legislature did not provide for the situation, it would or might have provided relief had it thought of the situation.

Precisely in point is what Mr. Justice BRANDEIS, speaking for a unanimous Court, had to say about the federal Soldiers' and Sailors' Relief Act of 1918. In *Ebert* v. *Poston*, 266 U. S. 548 (1925), he said (p. 554):

> "Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions."

In cases under the present federal Soldiers' and Sailors' Relief Act, the *Ebert* case has been cited and quoted with approval. *Parliman* v. *Delaware L. & W. R. R.*, 163 F. [2d] 726, 731 (3rd Circ., 1947); *Lesher* v. *Louisville Gas & Electric Co.*, 49 F. Supp. 88, 90 (W. D., Ky., 1943); *Arkless* v. *Kilstein*, 61 F. Supp. 886, 888 (E. D., Pa., 1944). In addition, the basic principle of that case has been applied without citing it. *Pfeiffer* v. *McGarvey*, 61 F. Supp. 570 (E. D., Pa., 1945).

Both the Act itself and the cases under it indicate clearly that there are limits on the benefits which it confers. In *Polis* v. *Creedon*, 162 F. [2d] 908 (U. S. Emerg. Ct. of App., 1947), it was held that the Act does not bar a reduction in rent by the Area Rent Director although the landlord was in the military service, on the ground that the administrative officials imposing the decrease in rent are not courts within the meaning of the Act. In *Boone* v. *Lightner*, 319 U. S. 561 (1943), this Court upheld a denial of a stay of an action to one in the military service where the lower court found that the ability of the soldier to defend was not materially affected by reason of his military service although the soldier was stationed in Washington, D. C., and the case was being tried in North Carolina. Similarly, see *Matter of De Metre* v. *Hall*, 269 App. Div. 802 (3rd Dept., 1945).

The Act is replete with limiting provisions. Under some circumstances its protection may be waived. 50 App. U. S. C. A. §513 (4). In many instances its protection does not apply unless the person "was prejudiced by reason of his military service." 50 App. U. S. C. A. §§520 (4), 530 (2), 531 (3), 532 (2), 535 (1) (2), 536, 560 (2). Stays will not be granted where the ability to prosecute or defend "is not materially affected by reason of his

military service." 50 App. U. S. C. A. §§521, 523, 590 (1). See also, 50 App. U. S. C. A. 533.

The petitioner's general reliance on the Soldiers' and Sailors' Civil Relief Act treats the law as though the enactment were confined to the general statement of policy contained in 50 App. U. S. C. A. §510. The law however is specific and detailed. There is no basis for applying it unless the situation or circumstances involved reasonably fall within the scope of one of the many specific provisions of the law.

(3)

Aside from the general reliance on the Soldiers' and Sailors' Civil Relief laws and the general policy sections contained in them, the petitioner, in the Court below, appeared to rely primarily on 50 App. U. S. C. A. §522.

Section 522 reads as follows:

> "§522. **Fines and penalties on contracts, etc.** When an action for compliance with the terms of any contract is stayed pursuant to this Act no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation and a fine or penalty for such nonperformance is incurred a court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired."

This section, in our opinion, has not the slightest applicability to the case at bar. It appears to deal exclu-

sively with obligations under a contract. The portions of the section which indicate what it applies to read as follows: "When an action for compliance with the terms of any contract * * *, and in any case where a person fails to perform any obligation and a fine or penalty for such nonperformance is incurred * * *."

Even if we assume that the latter part of the section deals with obligations other than contracts, it has no applicability. First, it deals with failure "to perform any obligation," and obviously the right to sign the payroll under protest is not an obligation. Secondly, relief is afforded only when by reason of military service "the ability of such person to pay or perform was thereby materially impaired." The quoted phrases show its lack of pertinence, but, in any event, there is not an indication in the record that the petitioner's ability "to pay or perform" was materially impaired by his military service. He had nothing to pay. Assuming that noting the protest on the payroll was something he had to perform, his military service did not impair his power to do so in the slightest. He was aware over a period of several years that he was receiving a lesser differential. He had taken affirmative steps which led to this. He was stationed at Camp Upton, close to New York City (fol. 105). There is not the slightest indication that he could not have come to the City to note his protest or that he could not have requested his wife, who had his power of attorney to sign the payroll, to note the protests. In fact, the record reveals that the petitioner was in the City on a number of occasions in connection with the charges brought against him (fols. 77, 88-89, 96, 99-100). Nowhere in the record does it "appear" that his military service "materially impaired" his ability to note his protest on the payroll.

Moreover, the section deals with fines and penalties. There is no basis for holding that "the public policy of the State"* as laid down in the Administrative Code provision constitutes the imposition of a fine or penalty. We are unaware of any definition of fine or penalty which even comes close to bringing such a public policy within its scope. See, for example, *Village of Lancaster* v. *Richardson* 4 Lans. 136, 139-140 (1871); *Bagley* v. *Peddie,* 16 N. Y. 469 (1857); *Ward* v. *Hudson River Bldg. Co.,* 125 N. Y. 230 (1891); *Hicks* v. *Monarch Cycle Mfg. Co.,* 176 N. Y. 111 (1903); *Albertina Realty Co.* v. *Rosbro Realty Corp.,* 258 N. Y. 472, 475 (1932); *People ex. rel. Kane* v. *Sloane,* 98 App. Div. 450 (4th Dept., 1904); *City of Buffalo* v. *Neubeck,* 209 App. Div. 386 (4th Dept., 1924); *Hasbrouck* v. *Van Winkle,* 261 App. Div. 679 (3rd Dept., 1941).

(4)

The petitioner, in the Court below, seemed to rely also on 50 App. U. S. C. A. §525 because he cited and quoted from *Parker* v. *State of New York,* 185 Misc. 584 (Ct. of Claims, 1945) which was decided on the basis of that section.

Section 525 reads as follows:

> "§525. **Statutes of limitations as affected by period of service.**
>
> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in

* *Quayle* v. *City of New York,* 278 N. Y. 19, 24 (1938).

> military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 [Oct. 6, 1942] be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

The *Parker* case, which was decided on the basis of this section, has a delusive appearance of similarity to the case at bar. It also was an action for the differential under New York Military Law §245. There, the plaintiff had received no part of his differential in pay from the State. The great difference between that case and the case at bar, however, is that in the *Parker* case there was no question of failure to sign the payroll under protest and no reliance on any provision similar to Administrative Code §93c-2.0. The question involved was whether the six month period for filing a claim or notice of intention to file a claim was a period of limitation within the meaning of the Soldiers' and Sailors' Civil Relief law section referred to above.

Whether or not the notice of claim provisions are to be regarded as periods of limitation, it would seem beyond dispute that the public policy provision, requiring a protest to be noted on the payroll in order to dispute in the future the adequacy of the pay receipt, is not a period of limitation. It lacks any resemblance to a period of limitation in that it requires the noting of the protest on the payroll, which obviously involves a more or less immediate act. Unlike statutes of limitations or the notice of claim

provisions, it does not set up any period of time in which action must be taken.

(5)

In conclusion it should be noted that most of the employees of the City and State of New York who rendered military service did not receive any pay differential under New York Military Law §245. They were confined to their service pay.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 8, 1950.

Respectfully submitted,

JOHN P. MCGRATH,
Corporation Counsel of the
City of New York,
Counsel for Respondents.

STANLEY BUCHSBAUM,
of Counsel.